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In the Supreme Court of the United States

OCTOBER TERM, 1970

FILIPPO SACCO a/k/a JOHN ROSSELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

WILL WILSON,
Assistant Attorney General,

ROGER A. PAULEY,
MICHAEL G. KELLY,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 428 F. 2d 264.

JURISDICTION

The judgment of the court of appeals was entered June 17, 1970. A petition for rehearing was denied July 21, 1970. The petition for a writ of certiorari

was filed August 18, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence supports petitioner's conviction for failing to register as an alien.

2. Whether the evidence against petitioner was tainted by electronic eavesdropping.

STATEMENT

Petitioner was charged in the Central District of California with having failed to register as an alien from 1962-1967 and having failed to notify the Attorney General of his address. He was sentenced to imprisonment for six months on the first count and 30 days on the others, the sentences to run concurrently. The court of appeals affirmed (Pet. App. A).

Petitioner's failure to register as an alien was undisputed at the trial. It was also uncontested that beginning in the 1920's he used the name John Rosselli and had on various occasions since 1940 claimed to have been born in Chicago in July 1904.[1] Petitioner does not, however, now deny that he is in fact Filippo Sacco, who was brought to the United States in 1911 from Naples, Italy, where he was born in 1905. (Pet. 2). Relying on the Act of February 10, 1855, 10 Stat. 604, Rev. Stat. 1944, repealed by Act of

[1] A register of births for Chicago for 1904 lists the birth of Giovanni Rosselli on July 4, 1904, and a register of births for 1905 lists a birth on June 4, 1905. A delayed birth report in 1936 contains an affidavit as to the reported birth on July 4, 1904.

September 22, 1922, 42 Stat. 1022, petitioner argued that he was in fact a citizen by virtue of his mother's marriage in February, 1922 (after his father's death) to a naturalized citizen named Ciancuilli.

The government's evidence showed that Ciancuilli was not able to contract a valid marriage with Maria Sacco in February 1922. In 1894 Ciancuilli married Liberata Dezueza in a church ceremony performed in Boston. Later, when the couple returned to Italy, the fact of the Boston marriage was recorded in Italy. Liberata bore Ciancuilli two sons, after which Ciancuilli left her (T. 1114-1115). He returned to the United States and lived with another woman, Carmina Tedesco, until her death in 1918 (T. 744). Ciancuilli went back to Italy in 1922 and remained there until his death in 1944. Liberata died in Italy in 1939, and her death certificate described Ciancuilli as her husband (T. 892-894, 1129). The evidence indicated that the marriage of Ciancuilli and Liberata was never terminated by annulment or divorce in Italy or in any of the Massachusetts counties where they had resided (T. 730-743, 745, 895-899, 1127-1128).

Petitioner's mother, Maria Sacco, a Massachusetts resident, was unable to travel to the trial. But the court admitted her signed statement as a declaration concerning family history and her deposition started by petitioner but not completed by cross-examination. According to Mrs. Sacco, she and Ciancuilli formed a common household for a short time and in 1920 a daughter was born.[2] (Tr. 1049-1051). In

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[2] The various records introduced at trial showed conflicting birth dates. A report of a birth, which was unattended,

1921 she and Ciancuilli obtained a marriage certificate from the Boston City Hall. Maria stated that "I believed we were then married like in the old country, Italy, and would then go to the church for the blessing * * * but some neighbors told me we were not legally married" (Tr. 936). The couple separated when she was told that Ciancuilli had a wife in Italy. After Ciancuilli admitted this, a ceremony before a justice of the peace took place on February 8, 1922. (Tr. 936-937). However, only a few weeks later Ciancuilli indicated in a passport application that he was sailing for Italy on April 22, 1922, and reported his residence as 151 Richmond Street, indicating that he was not living with Maria at the time (Tr. 745, 1127, 1182). Maria never heard from him again (Tr. 1057). In each year since the 1940 Alien Registration Act to the time of trial, Maria Sacco registered as a resident alien and never used the name Ciancuilli. (T. 334-335, 493-494, 1135-1136).[3]

The case was submitted to the jury with alternative instructions: in order to convict they would have to find that the government had shown (1) that at the time of the 1922 marriage, Ciancuilli had a living spouse and that such person's prior marriage had not been terminated by annulment or divorce, or (2)

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showed the daughter to have been born in June 1921 while a baptismal certificate placed her birth in June 1922. School records gave her birth as August 1920, the year Mrs. Sacco also gave as the birth-date of this daughter by Ciancuilli (Tr. 1122-1124).

[3] Her daughter changed her name from Ciancuilli to Sacco in 1941 (Tr. 1059).

that the 1922 marriage ceremony was not entered into with the good faith intention to assume the relationship of husband and wife, but was entered into for a collateral purpose. Either finding would mean that neither Maria Sacco nor her then minor child, the petitioner, secured derivative citizenship (T. 1220-1220a).

ARGUMENT

1. Petitioner argues as if he had at all times claimed to be the child of Maria Sacco, truly believed that he had acquired derivative citizenship by Maria's marriage in 1922 and was suddenly confronted with a claim that the marriage was invalid. This is not the case. The government was not, as petitioner claims, belatedly attempting to set aside a claim of derivative citizenship which had been recognized for 46 years. Compare *Lim v. Mitchell*, No. 23,787, C.A. 9, decided August 21, 1970. It started out to show that petitioner's claims of United States birth as John Rosselli were false. When petitioner injected the issue of derivative citizenship in the case, the government properly showed that there had not been a valid marriage within the meaning of the Act of February 10, 1855, 10 Stat. 604, Rev. Stat. 1994, repealed by Act of September 22, 1922, 42 Stat. 1022. The jury agreed[1] and the evidence summarized in the

[1] We do not understand petitioner to attack the correctness of the jury instructions. Rather his position is that the jury should have been required to make special findings rather than return a general verdict. (Pet. 16-17, 28). *Bachellar v. Maryland*, 397 U.S. 564, the case relied upon for this proposition, fails to support it.

statement amply supports the conclusion that Maria's 1922 marriage was invalid and that she did regard it as such.[5]

2. Prior to the trial of this case, the government disclosed that there had been electronic surveillance of the petitioner (T. 1302), but, noting that the surveillance had in no way tainted this case, requested that for adequate reasons a hearing be postponed (see Pet. App. A 19-20; T. 21-25), until after trial. The court granted the request and denied defense motions for discovery and a pre-trial hearing relating to the electronic surveillance (T. 4-29). Following the verdict, a hearing was held on the issue of taint and on whether additional discovery should have been allowed to the defense. By stipulation evidentiary portions of a hearing on electronic surveillance in another related case in which the petitioner stands convicted were made part of the record (T. 1268-1270). Eleven volumes of logs of the surveillance were made available to the defense, the original tapes having been destroyed according to customary practice (T. 1257, 1271, 1273). The defense contended that it should have been allowed to discover the names of persons making, monitoring and removing the installations (T. 1271, 1274-1275). However, the court invited the defense to point out in the logs "a particular thing that might have some relevance" to the questions whether Sacco was a United States citizen

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[5] Petitioner's other claims with respect to 8 U.S.C. 1451, were adequately answered by the court of appeals (Pet. App. A, at 4-5).

and whether he filed the required reports (T. 1277).[6] Having received no response to its invitation the court properly determined that taint had not been shown (T. 1299-1303).

As the court of appeals noted, there is ample authority to support the view that such a post-trial hearing is a proper procedure (Pet. App. A 21). The contention that petitioner was not given all of the material from the surveillance involves nothing more than a claim that petitioner was not told the names of agents directly handling the electronic device. Their names were not relevant and therefore the trial court properly excised them from the logs before they were turned over to the defense (T. 1270-1271).

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[6] The court also permitted the defense to examine the agents involved in the related case, which involved a gambling investigation, in an effort to determine whether there was any connection between that investigation and the indictment in this case (T. 1278-1298).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

ROGER A. PAULEY,
MICHAEL G. KELLY,
Attorneys.

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